

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

**THE HONOURABLE MR. JUSTICE C.N.RAMACHANDRAN NAIR
&
THE HONOURABLE MR. JUSTICE K.M.JOSEPH**

THURSDAY, THE 16TH NOVEMBER 2006 / 25TH KARTHIKA 1928

C.E.Appeal.No. 8 of 2006

**FO.1881/2005 of CUSTOMS,EXCISE&SERVICE TAX
APP.TRIBUNAL,BANGALORE**

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APPELLANT:

**THE COMMISSIONER OF CENTRAL EXCISE &
CUSTOMS, COCHIN COMMISSIONERATE,
C.R. BUILDINGS, I.S. PRESS ROAD,
KOCHI-682 018.**

BY ADV. SRI.JOHN VARGHESE, ASSISTANT SG

RESPONDENT:

**M/S. LOVELY FOOD INDUSTRIES,
POOCHAKKAL, CHERTHALA-688 526.**

**BY ADV. SRI.C.S.GOPALAKRISHNAN NAIR
SMT.CHANDINI G.NAIR**

**THIS CENTRAL EXCISE APPEAL HAVING BEEN FINALLY HEARD
ON 3.11.2006 ALONG WITH C.E.A.NO.10/06, THE COURT ON 16.11.2006
PASSED THE FOLLOWING:**

**C. N. RAMACHANDRAN NAIR &
K. M. JOSEPH, JJ.**

C.E.A. NOS. 8 & 10 OF 2006

Dated this the 16th day of November, 2006

C.R.

JUDGMENT

K. M. Joseph, J.

Since common question arises in these Appeals, they are disposed of by a common Judgment.

2. The respondents/assesseees are engaged in manufacture of vegetable and non-vegetable pickles falling under CETH 2001.10. Acting on the basis of intelligence gathered, inspection was carried out by the Officers and they found out that the assesseees were manufacturing and clearing pickles bearing the brand name “Melam” to M/s. MVJ Foods (India) Pvt. Ltd., Always without payment of duty. It is found that one Shri James Zachariahs, who is the Proprietor of M/s. Anchuthara Food Products, the respondent in C.E.A. No.10/06 and who is also the husband of Smt. Lissy James who is the Proprietrix of M/s. Lovely

Food Industries, Poochakkal, the respondent in C.E.A. No.8/06, was managing the affairs of both the proprietary concerns. Notices were issued to show cause why the benefit of Notification No.1/93 dated 28.2.1993 as amended from time to time should not be denied to their products cleared under another person's brand name and the duty and penalty equal to duty should not be demanded under Section 11A of the Central Excise & Salt Act, 1944. The show cause contained notice as to why penalties should not be imposed under other provisions and interest should not be demanded under Section 11A of the Act. Respondents submitted common reply. The Officer ordered payment of penalty at Rs.1,30,396/= on M/s. Lovely Food Industries and Rs.67,556/= on M/s. Anchuthara Food Products under Section 11A of the Act. This is besides the duty demanded of Rs.1,30,396/= on M/s. Lovely Food Industries and Rs.67,556/= on M/s. Anchuthara Food Products respectively. Set off was allowed to the extent of Rs.4,642/= in respect of

M/s.Lovely Food Industries and Rs.58,931/= in respect of M/s. Anchuthara Food Products towards MODVAT credit under rule 9(2) of the erstwhile Rules. Interest was also ordered under Section 11AB. The order was confirmed except to the extent that personal penalty imposed each on the Proprietors was done away with. However, in Appeal carried to the Tribunal, the Tribunal accepted the contention of the respondents/assesseees that the notices issued were barred and consequential relief was directed to be given.

3. Section 11A of the Central Excise & Salt Act, 1944 being relevant, is extracted hereunder:

“11A: Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded - (1) When any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, a Central Excise Officer may, within six months from the relevant date, serve notice on the person

chargeable with the duty which has not been levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

Provided that where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud, collusion or any wilful mis-statement or suppression of fact, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, by such person or his agent, the provisions of this sub-section shall have effect, as if for the words “Central Excise Officer” the words “Collector of Central Excise” and for the words “six months”, the words “five years” were substituted”

4. The normal period of limitation provided under the Act is six months. However, in the contingencies specifically mentioned in the proviso, Revenue gets an extended period of five years to issue notice. The tribunal has found that no

case is made out entitling the Revenue to the benefit of extended period of five years. Learned Assistant Solicitor General of India, appearing on behalf of the appellant, would submit that this is a case where the respondents/assesseees had cleared excisable goods without taking registration as is required, paying duty. The Notification in no uncertain terms declares that benefit of exemption is not available when goods are cleared with a brand name. There is no dispute regarding the fact that goods bearing the brand name of another have been cleared by respondents without taking out registration and payment of the requisite excise duty. Learned counsel for the respondents/assesseees submitted that the respondents in these cases were entitled to exemption. They were running small scale industries. They were under the bona fide impression that they were entitled to exemption. It is submitted that there is no suppression on their part. None of the contingencies mentioned in the provision is made out, it

is submitted. Learned counsel for respondents would rely on the following decisions:

5. In Hindustan Steel Ltd. v. State of Orissa (1978 ELT (J159)), the Apex Court took the view that no penalty should be imposed for a technical or a venial breach of the legal provisions or where the breach flows from the bona fide belief that the offender is not liable to act in the manner prescribed by the Statute. In Collector of Central Excise v. Chemphar Drugs & Liniments (1989 (40) ELT 276), the Apex Court held as follows:

“In order to make a demand under Section 11A of the Central Excises and Salt Act for beyond a period of six months and upto a period of five years something positive other than mere inaction or failaure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise, is to be established. Where Department had full knowledge about the facts and the manufacturer's action or inaction is based on

their belief that they were required or not required to carry out such action or inaction, the period beyond six months cannot be made applicable.”

That was a case where the Court noted that the unit was visited by the Excise Officers and the Department had full knowledge about the activities of the manufacturers. It is found that the value of the clearances of the exempted goods were not indicated under the belief that it was not required to be indicated. In Padmini Products v. Collector of C.Ex. (1989 (43) ELT 195), the Apex Court held as follows:

“When in view of the Trade notices there is scope for believing that the goods were entitled to exemption and consequently no licence is required to be taken out, then the extended period of limitation for demand uander Section 11A is inapplicable. Mere failure or negligence on the part of the manufacturer either not to take out a licence or not to pay duty in case where there was scope for doubt, does not attract the extended limitation. Unless there is evidence that the

manufacturer knew that goods were liable to duty or he was required to take out a licence. For invoking extended period of five years limitation duty should not had been paid, short levied or short paid or erroneously refunded because of either any fraud, collusion or wilful mis-statement or suppression of facts or contravention of any provision of the Act or Rules made thereunder. These ingredients postulate a positive act, therefore, failure to pay duty or take out a licence is not necessary due to fraud or collusion or wilful mis-statement or suppression of facts or contravention of any provisions of the Act. Likewise suppression of facts is not failure to disclose the legal consequences of a certain provision.”

That was a case where apparently, the Court took note of the trade notice which gave scope for believing that the goods were entitled to exemption. Again in Tamil Nadu Housing Board v. Collector of Central Excise, Madras (1994 (74) ELT 9), the Apex Court held as follows:

“The proviso is in the nature of an exception to the principal clause. Therefore, its exercise is hedged on one hand with existence of such situations as have been visualised by the proviso by using such strong expression as fraud, collusion etc. and on the other hand it should have been with intention to evade payment of duty. Both must concur to enable the Excise Officer to proceed under this proviso and invoke the exceptional power. Since the proviso extends the period of limitation from six months to five years it has to be construed strictly. The initial burden is on the Department to prove that the situations visualised by the proviso existed. But once the Department is able to bring on record material to show that the appellant was guilty of any of those situations which are visualised by the Section, the burden shifts and then applicability of the proviso has to be construed liberally.”

It was further held that it was not mere failure to pay duty and the assessee must aware that the duty was leviable and it must deliberately avoid paying it. That was a case where the

appellant, the Housing Board, a non-profit making statutory body, had two units. The appellant has not taken out licence on the basis of the oral advice by the Central Excise Authorities that no licence was needed for it. It was in such circumstances that the Supreme Court held that there was no intent to evade payment of duty and, therefore, the extended period is not available to the Revenue. In Cosmic Dye Chemical v. Collector of Central Excise, Bombay (1995 (75) ELT 721), the Apex Court dealt with a case where the manufacturer did not include the value of clearance of fully exempted goods in its declaration for the previous financial years due to a bona fide impression derived from two High Court judgments, which held that the fully exempted goods were not includable in the definition of “excisable goods”. It was in such circumstances that the Apex Court held as follows:

“6. Now so far as fraud and collusion are concerned, it is evident that the requisite intent, i.e.,

intent to evade duty is built into these very words. So far as mis-statement or suppression of facts are concerned, they are clearly qualified by the word “wilful” preceding the words “mis-statement or suppression of facts” which means with intent to evade duty. The next set of words “contravention of any of the provisions of this Act or Rules” are again qualified by the immediately following words “with intent to evade payment of duty”. It is, therefore, not correct to say that there can be a suppression or mis-statement of fact, which is not wilful and yet constitutes a permissible ground for the purpose of the proviso to Section 11A. Mis-statement or suppression of fact must be wilful.”

In State of Madhya Pradesh v. Bharat Heavy Electricals (1998 (99) ELT 33), in the context of the Madhya Pradesh Sthaniya Kshetra Me Mal Ke Pravesh Par Kar Adhiniyam, 1976, the expression “shall be liable to pay penalty equal to ten times the amount of entry tax” was understood as meaning only the maximum amount of penalty which could

be levied and the Assessing Authority was found vested with the discretion to levy a lesser amount depending upon the facts of each case. The decision of the Apex Court in Zunjarrao Bhikaji Nagarkar v. Union of India (1999 (112) ELT 772) is also on the same lines.

6. As far as the facts of these cases are concerned, it is clear that the respondents had entered into agreements under which they manufactured goods with the brand name “Melam”. As found by the first appellate authority, it is not in dispute that till the Central Excise Officers visited the two concerns, the owners of those concerns had not informed the Department about the manufacturing activity and clearance of branded goods. Respondents did not file any declaration with the Department. In view of the clear provisions of the Notification No.1/93 dated 28.2.1993, there could not be any ambiguity that exemption was not available under the

Notification where the manufacturer affixes the specified goods with the brand name of another. Respondents have yet manufactured and cleared goods without paying duty and without taking out registration and without maintaining statutory records. They cannot disown knowledge of their own act in manufacturing goods with brand name and clearing them. Apparently, the Officers were unaware of the said activities of the respondents. In such circumstances, respondents are not entitled to claim that they were under any bona fide impression about the liability to take out registration and pay excise duty in regard to the turnover. An inference of suppression in such circumstances is inevitable. It is clear that the respondents were clearing goods with the intent to evade duty. Unlike in the facts available in the case law made available, it is not open to the respondents to feign unfamiliarity with the provisions of

the Notification No.1/93 dated 28.2.1993. There is no ambiguity about its terms. In fact, the tribunal has found that the Notification in question is very clear and benefit is not available to those manufacturers who affix the specified goods with brand name of another person. It is also found that the respondents were required to have filed their declaration and disclose the facts. The fact that the Department took three years from the date of visit to the factory on 5.11.1999 to issue notices cannot take away the efficacy of the contention of the appellant that it is entitled to the extended period of five years. The acts and omissions on the part of the respondents could, therefore, be viewed only as accompanied by the requisite intent to evade payment of duty. If that be so, we are unable to subscribe to the view taken by the tribunal that the respondents are entitled to the benefit of the plea of “time barred”. We are of the view that in the facts and circumstances of these cases,

the extended period of five years was available to the Officers under the proviso. The contention of counsel for respondents based on the doing away with the personal penalty, is without any merit.

7. It is, no doubt, true that the tribunal has not dealt with the quantum of penalty. Having regard to the decision of the Apex Court which is already referred to, we accept the plea of the respondents that while penalty is inevitable, in the circumstances, the quantum of penalty falls within the domain of discretion. We feel, in the facts and circumstances of these cases, it may not be in the interest of justice to remit it back for consideration of the question as to quantum. We take note of the fact that the respondents are small scale units. In the circumstances, we think it would be just to direct that the respondents be visited with penalty equivalent to thirty per cent of the duty instead of the full amount as levied by the Officer as modified in appeals by

the first appellate authority. Accordingly, we allow the Appeals and the order in original by the adjudicating authority as confirmed by the appellate authority in first appeal shall stand restored except in regard to the penalty which we direct, shall be levied in a sum equivalent to thirty per cent of the duty.

The C.E. Appeals are allowed in part as stated above.

C. N. RAMACHANDRAN NAIR, JUDGE

K. M. JOSEPH, JUDGE

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